

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BERNADEAN RITTMANN, et al.,

Plaintiffs,

v.

AMAZON.COM, INC., et al.,

Defendants.

Consolidated Action  
Case No. C16-1554 JCC

**SCHEDULING PROPOSAL PURSUANT  
TO COURT ORDER (ECF NO. 271)**

Pursuant to this Court's February 9, 2023 minute order (ECF No. 271), the Parties met and conferred in an effort to agree upon a proposed amended case schedule regarding the Amazon Defendants' ("Amazon") Motion to Compel Arbitration, Plaintiffs' proposed Class Certification Motion, and any other deadlines the parties deem necessary to streamline the resolution of this case. The Parties, however, could not reach an agreement and, therefore, submit below their respective positions regarding the schedule:

**PLAINTIFFS' POSITION**

Plaintiffs continue to believe that any further stay in this matter is inappropriate and that a schedule that keeps this case moving is essential. Although Judge Martinez recently issued a stay in *Waithaka v. Amazon.com Inc.*, Civ. A. No. 2:19-cv-1320 (W.D. Wa.), this case is materially different because multiple named plaintiffs and opt-in plaintiffs have opted out of arbitration and

are concededly not bound to arbitrate, regardless of the outcome of the pending *Carmona* case in the Ninth Circuit. Indeed, Defendants concede in their Renewed Motion to Compel Arbitration that nine individuals, including several lead plaintiffs, opted out of the arbitration provision. *See* ECF No. 248, ¶ 137. Thus, as the Court previously recognized, “here there are plaintiffs whose claims will remain even if Defendant’s motion to compel arbitration were successful”, which counsels in favor of deferring consideration of the Motion to Compel Arbitration until it can be heard in conjunction with class certification. *See* ECF No. 237 at 2.

Plaintiffs propose a schedule that would allow for prompt resolution of Defendants’ pending Motion to Dismiss (ECF No. 273), to be followed by prompt amendment of the pleadings to the extent any amendment is necessary and/or permitted. Thereafter, Plaintiffs would promptly file their Motion for Class Certification of their state law claims and would also formally renew their Motion for Conditional Certification pursuant to Section 216(b) of the FLSA (ECF No. 20).<sup>1</sup> Specifically, Plaintiffs propose the following:

- Amazon has recently withdrawn its prior Motion to Dismiss and re-filed a new Motion to Dismiss the First Amended Consolidated Complaint (ECF No. 273). This new Motion is substantively nearly identical to its prior Motion and merely adds a brief section addressing the amended PAGA allegations on behalf of Plaintiffs Keller and Garadis. Thus, Plaintiffs propose to file their Opposition immediately and no later than February 20, 2023, and Amazon may file its Reply by February 24, 2023. This Motion should be taken up and decided without further delay.

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<sup>1</sup> Defendants concede that several named plaintiffs who bring FLSA claims (Rittmann, Carroll, and Wehmeyer) are not bound to arbitrate, and therefore there is no reason that conditional certification of the FLSA claims should not be taken up immediately. The Court previously stayed consideration of Plaintiff’s Motion to Issue Notice (ECF No. 20) “until such a time that the claims and issues are more definite.” ECF No. 76 at 7. Plaintiffs have since re-pled their FLSA claims, the stay in this case has now been lifted, and it is clear that many drivers – including three named plaintiffs who are bringing FLSA claims – are not bound to arbitrate because they opted out of arbitration. As such, at a minimum, the Motion for Conditional Certification should be heard concurrent with Defendants’ Renewed Motion to Compel Arbitration.

- 1 • To the extent Plaintiffs are permitted or required to replead any claims following a ruling  
2 on the pending Motion to Dismiss (ECF No. 273), Plaintiffs will file a Second Amended  
3 Consolidated Complaint within two (2) weeks of the Court's ruling on the Motion to  
4 Dismiss. (If the court rules by March 3, 2023, Plaintiffs will file the amended complaint  
5 by March 17, 2023.)
- 6 • Plaintiffs will file their Motion for Class Certification within two (2) weeks of filing their  
7 amended pleading (for example, on or before March 31, 2023, if the Court rules on the  
8 Motion to Dismiss by March 3, 2023).
- 9     ○ Plaintiffs' Motion for Class Certification will be noted for the fourth Friday after  
10 filing, as specified by the default Local Rules (e.g., by April 28, 2023, if the Court  
11 rules on the Motion to Dismiss by March 3; Amazon's response would be due April  
12 24 and Plaintiffs' Reply would be due April 28 under the default rules).
- 13 • Plaintiffs' Motion for Conditional Certification of their FLSA claims (ECF No. 20) may  
14 be renewed at any time. Plaintiffs will re-file and re-note their Motion, updating the  
15 contents to reflect the timeframe that has passed since it was originally filed in 2016 and  
16 new case law.
- 17 • Defendants' Motion to Compel Arbitration (ECF No. 247) will be re-noted to the same  
18 date as Plaintiffs' Motion for Class Certification (or April 28, 2023, in Plaintiffs'  
19 example). Plaintiffs propose to file their Opposition to Defendants' Renewed Motion to  
20 Compel Arbitration on or before three (3) weeks prior to the noting date, and Amazon  
21 would file its Reply on the noting date).<sup>2</sup>

22 Under Plaintiffs' proposal, the earliest they would file their Motion for Class Certification  
23 would be the end of March 2023, and likely sometime this spring. This brief delay should permit  
24 Amazon's Motion to Dismiss to be resolved and any amendments to the pleadings to be addressed  
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26 <sup>2</sup> On October 11, 2022, after receiving comprehensive submissions from both sides  
regarding the proper schedule for the case, this Court previously issued an Order stating that "the  
motion for class certification and motion to compel arbitration shall be considered in conjunction."  
ECF No. 237 at 2 (emphasis added). This issue has already been decided in Plaintiffs' favor, and  
Amazon's continued efforts to have its Motion heard first as a threshold issue should be rejected.  
It is primarily Amazon's intransigence on this issue that has prevented the Parties from agreeing  
on a joint scheduling proposal.

1 in the interim. It should also provide ample time for discovery. A number of named plaintiffs have  
2 already responded to Defendants' discovery requests, and all Plaintiffs will have responded by  
3 March 11, 2023.

#### 4 AMAZON'S POSITION

5  
6 Amazon maintains that the most appropriate course of action is to stay this action pending  
7 upcoming Ninth Circuit decisions in *Miller v. Amazon.com, Inc.* and *Carmona v. Domino's Pizza,*  
8 *LLC*. This is the course that Judge Martinez recently took, *sua sponte*, in *Waithaka v. Amazon.com,*  
9 *Inc.*, W.D. Wash. Case No. C19-1320RSM, ECF No. 153. Judge Martinez issued an order staying  
10 that case until the Ninth Circuit's resolution of *Carmona* and *Miller* because "a stay will avoid the  
11 possibility that this Court's resolution on whether an Amazon Flex delivery driver is exempt from  
12 the Federal Arbitration Act will conflict with the Ninth Circuit's upcoming decisions." *Id.*

13 If the Court is not so inclined to stay this action pending the Ninth Circuit's rulings in  
14 *Carmona* and *Miller*, then the schedule should be amended so that Amazon's Motion to Compel  
15 Arbitration should be decided first and not concurrently with Plaintiffs' forthcoming Motion for  
16 Class Certification. This would be the most efficient course because, among other things, a ruling  
17 on the Motion to Compel will materially impact the scope of the claims at issue and the putative  
18 classes, which will in turn impact, for each putative class, manageability, numerosity and the  
19 adequacy of the class representatives, which will in turn impact whether the proposed classes are  
20 certifiable, and if any class is certified, who receives a notice. Indeed, a ruling on a Motion to  
21 Compel Arbitration must precede class (and conditional) certification because notice should not  
22 be sent to putative class members who agreed to arbitrate.

23 While there are three named Plaintiffs who are not covered by the pending Motion to  
24 Compel Arbitration, those three Plaintiffs, Rittmann, Carroll and Wehmeyer, do not purport to  
25 bring every claim alleged on behalf of every putative class alleged in the First Amended  
26 Consolidated Complaint ("FACC"). Plaintiffs Rittmann and Carroll are putative class

1 representatives for the Washington Class, Carroll is a putative class representative for the  
2 California Class, and Wehmeyer is not a putative class representative, she only alleges a minimum  
3 wage claim under the Fair Labor Standards Act as part of the putative collective action. If the  
4 Motion to Compel Arbitration is granted, then there would not be any putative class representatives  
5 remaining in this action for the putative nationwide common law, Illinois, New Jersey or New  
6 York classes. As a result, if the Court were to compel arbitration, only a relatively small number  
7 of persons who did not opt out of arbitration would be potential class members. This likely will  
8 raise significant questions regarding numerosity of the Washington and California classes. By  
9 contrast, if the Court denies arbitration, significant questions regarding class manageability will  
10 need to be addressed in class certification briefing.

11 For these same reasons—that resolution of the Motion to Compel Arbitration would limit  
12 the Plaintiffs and claims at issue—resolving the Motion to Compel Arbitration first would greatly  
13 limit the scope of a Rule 12 motion in response to the FACC because most claims and most of the  
14 plaintiffs would no longer be at issue. Even if the Motion to Compel Arbitration were not resolved  
15 in favor of Amazon, Amazon’s Motion to Dismiss and/or Strike the FACC (“Motion to Dismiss  
16 the FACC”) should be resolved, and any further pleadings challenges resolved and an answer filed  
17 before Plaintiffs proceed with a Motion for Class Certification because the scope of the pleadings  
18 will dictate the scope of class certification. For example, if this Court agrees with Amazon that  
19 Plaintiffs cannot allege nationwide common law unjust enrichment claims under the law of every  
20 state, then that need not be briefed at class certification. The same goes for the various state law  
21 claims that are the subject of Amazon’s pending Motion to Dismiss the FACC. If class  
22 certification deadlines are keyed off the filing of a Second Amended Consolidated Class Action  
23 Complaint, as Plaintiffs propose—as opposed to Amazon’s Answer—then it is likely that the  
24 parties will be back in the same position that they are in now, uncertain of what claims are  
25 ultimately at issue and must be addressed in class certification briefing.  
26

1 Accordingly, Amazon proposes that the Motion to Compel Arbitration briefing schedule  
 2 remain the same (opposition due March 3 and reply due March 17), and other deadlines vacated  
 3 and reset after ruling as follows:

- 4 1. The Motion to Dismiss and/or Strike the First Amended Consolidated Class Action  
 5 Complaint (ECF No. 273) will be taken off calendar and a filing deadline for a Rule  
 6 12 motion or answer to the FACC should be filed within 14 days of an order on  
 7 arbitration.
- 8 2. Motion for Class Certification set 90 days after filing of an answer by Amazon<sup>3</sup>:  
 9 a. Opposition 35 days after the Motion for Class Certification deadline; and,  
 10 b. Note date/reply 15 days after the Opposition.

11 In the alternative, in the event that the Court is inclined to maintain a schedule under which  
 12 the Motion to Compel Arbitration and the Motion for Class Certification are concurrently briefed,  
 13 then Amazon proposes:

- 14 1. The briefing on the Motion to Compel Arbitration remain the same (opposition due  
 15 March 3 and reply due March 17).
- 16 2. The Motion to Dismiss the FACC (ECF No. 273) briefing will be concurrent with  
 17 the remaining Motion to Compel Arbitration briefing, with an opposition due  
 18 March 3 and reply due March 17.
- 19 3. Motion for Class Certification set 90 days after filing of an answer by Amazon  
 20 a. Opposition 35 days after the Motion for Class Certification deadline.  
 21 b. Note date/reply 15 days after the Opposition.

22  
 23 DATED this 15th day of February, 2023

24 Respectfully submitted,

25 \_\_\_\_\_  
 26 <sup>3</sup> Amazon does not object to Plaintiffs' re-filing their Motion for Conditional Certification of the  
 FLSA claims on the same schedule as the Court adopts for the Motion for Class Certification.

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